

THE RUSSIAN COURTS AND THE RUSSIAN CONSTITUTION

*Peter B. Maggs**

I. INTRODUCTION

It is a true honor to have been asked to give the Third John N. Hazard Lecture. I had the great pleasure of working with John Hazard during the last quarter-century of his long and illustrious career. In particular, I collaborated with him on the production of several of the later editions of his casebook on the Soviet legal system. In preparation for this lecture I looked in my law school's library and found a copy of a precursor of this casebook, John Hazard's mimeographed materials on Soviet law, dated December 1947. I looked in it for court decisions involving the Constitution. I only found one.

Some of you who studied with John Hazard may recall the second case in these materials, a case that also appeared in his casebook,¹ the case of K, apparently an outstanding Red Army sergeant, who made "politically incorrect"—I quote the phrase from John Hazard's translation—statements, including an offensive evaluation of the Constitution of the USSR. The sergeant was acquitted of anti-Soviet agitation and propaganda, and the USSR Supreme Court upheld the acquittal, finding that the sergeant's statements were not aimed against Soviet authority, but were directed toward the strengthening of military discipline. The placement of this decision at the very start—on page 3 of his materials—reflects John Hazard's practice of looking at the positive as well as the negative elements in the Soviet legal system. There are many ways courts can protect individual rights; judicial review of statutes for constitutionality is only one of them. Strict construction of criminal statutes, as in the case of K, is another. In this talk, I would like to trace the development of some of these positive aspects of the Soviet judicial system into the way courts apply the Constitution today.

A conscious choice made by John Hazard during his teaching was to pay a great deal of attention to Russian court cases. His academic colleagues in Europe and Russia often criticized him for this, pointing out that the Soviet Union had nothing like the Anglo-American system of precedent. However, John always argued that only by seeing a large number of concrete applications of a legal system could one understand its spirit. I fully agree with him, and so I have organized this lecture around court decisions interpreting and applying the Russian Constitution. I would like to start with a little history

* Corman Professor of Law, University of Illinois at Urbana-Champaign College of Law. The following is an edited version of remarks Professor Maggs delivered in the Spring of 1997 to the Association of the Bar in the City of New York.

1. JOHN N. HAZARD & ISAAC SHAPIRO, *THE SOVIET LEGAL SYSTEM* 73 (1962).

and then discuss the explosion in constitutional adjudication of the past few years.

II. THE RUSSIAN SUPREME COURT IN THE 1920S

In 1928, a Soviet legal scholar named Vsevolod Kornilevich Diablo published a book entitled *Judicial Protection of the Constitutions in Bourgeois States and the USSR*.² The book has a good account of judicial review for constitutionality in the United States and other Western countries, as well as an analysis of the role of the Soviet Supreme Court in constitutional adjudication. In the 1920s, the Soviet Supreme Court engaged in two types of constitutional decision-making. First, it could recommend to the Soviet executive—the Presidium of the Central Executive Committee—that the Presidium annul unconstitutional orders and decrees of central government agencies and ministries. Second, on request of the Presidium, it could provide advice on the constitutionality of legislation of the highest bodies of the Union Republics. During the period up to 1928, the Supreme Court rendered eighty-six opinions about the legality of acts of government agencies and eleven about republic legislation.³ Diablo urged expansion of judicial review, but this was not to be. When Stalin came to power in the late 1920s, judicial review by the Supreme Court stopped—Stalin had more arbitrary ways of determining who was violating his policies and more direct ways of dealing with the violators. The Supreme Court shifted to a new role, with most of its caseload being the review of criminal convictions. In this role, it did provide some protection of rights for those lucky ones, like Sergeant K, who had the good fortune to go through the regular judicial system rather than through the Special Boards of the secret police.

III. SCHOLARS SUPPORT JUDICIAL REVIEW

With the thaw that followed Stalin's death, Russian scholars started recalling the experience with judicial review in the 1920s and writing very positive things about it.⁴ The fact that judicial review was a policy in effect while Lenin was alive made the area relatively safe for discussion.

2. VSEVOLOD KORNILEVICH DIABLO, *SUDEBNAIA OKHRANA KONSTITUTSII V BURZHUAZNYKH GOSUDARTSVAKH I V SOIUZE SSR* (1928).

3. Peter H. Solomon, Jr., *The U.S.S.R. Supreme Court: History, Role, and Future Prospects*, 38 AM. J. COMP. L. 127, 128 (1990).

4. S.G. Bannikov, *Verkhovnyi sud SSSR I sovershenstvovanie sovetskogo zakonodatel'stva*, in VERKHOVNYI SUD SSSR 47 (L.N. Smirnov et al. eds., 1974); T.N. DOBROVOLSKAIA, VERKHOVNYI SUD SSSR 18-32 (1964).

IV. THE COURTS START TO CITE THE CONSTITUTION

By the late 1960s, and perhaps earlier—I have not checked all the published cases—the USSR and Russian Supreme Courts began to cite the Constitution in their published rulings. I have seen no case in which they cited the Constitution to hold particular legislation unconstitutional. Most of the citations were to very general principles; for instance, a 1963 ruling of the USSR Supreme Court exhorted judges to obey Article 112 of the 1936 Constitution, which provided for judicial independence. By the late 1970s, some of the citations to the Constitution had become a little more daring. In general rulings in particular areas of the law, the USSR Supreme Court would cite, in parallel, sections of the Constitution and statutes implementing those sections. For instance, in a ruling of June 16, 1978, it cited Article 158 of the Constitution and Article 13 of the Fundamental Principles of Criminal Court Procedure, both of which guaranteed the right to counsel.⁵ The same ruling also cited in parallel Article 159 of the Constitution and Article 11 of the Fundamental Principles of Criminal Court Procedure, both of which guaranteed the right to the services of an interpreter. By 1988, the USSR Supreme Court had moved a step further. In a December 23, 1988 decision, the Court issued a “guiding explanation” instructing lower courts how to handle complaints of illegal actions by officials; it suggested that refusal by state health institutions to provide medical assistance could be attacked as a denial of the right to health care provided by Article 42 of the USSR Constitution.⁶

V. THE COMMITTEE ON CONSTITUTIONAL SUPERVISION

Gorbachev's reforms in the late 1980s reintroduced many of the features of the Soviet system of the 1920s, for instance the two-tiered Parliament of a Council of People's Deputies and Supreme Soviet. The reforms created the Committee on Constitutional Supervision, with powers in many ways similar to those of the Supreme Court in the 1920s. Like its predecessor, the Committee had a dual function, ensuring the protection of constitutional rights, and keeping the republics in line with the central authorities' policy in legal matters. As various commentators, including myself have pointed out, the Committee did much better in protecting individual rights than in restraining the increasingly independent republics. The Committee's best opinions on individual rights, for instance its opinion invalidating the residence permit system, were an auspicious starting point for the judicial protection of human rights in Russia. I will not dwell further

5. *Biull. Verkh. Suda SSSR*, 1978, No. 4, p. 8.

6. *Biull. Verkh. Suda SSSR*, 1989, No. 1, p. 4.

on the work of the Committee. Neither it nor, for that matter, the Soviet Union still exists. And there are many excellent published articles on the Committee's work. I will move directly to the Russian courts of today.

VI. THE COURT SYSTEMS OF THE RUSSIAN FEDERATION

A. *Introduction*

For the last several years there have been three separate court systems in the Russian Federation: the Constitutional Court, the courts of general jurisdiction, and the commercial courts. The Constitutional Court has jurisdiction only over constitutional cases. The courts of general jurisdiction have jurisdiction over all cases except those where neither party was a private citizen. The commercial courts have jurisdiction over suits involving enterprises or entrepreneurs suing one another or suing government agencies. This third system of courts has evolved from highly informal, quasi-arbitration tribunals created in the 1930s, to full-fledged adversarial commercial courts today. To reflect this change, I will call them "commercial courts," though their Russian name, "arbitrazh courts," still reflects their origin. These are the same courts that many still refer to as "arbitration courts," but their current role has nothing to do with arbitration.

B. *The Constitutional Court*

1. *Introduction*

There have been two phases in the history of the Russian Constitutional Court. Its first phase lasted from 1991 until the fall of 1993. During the spring and summer of 1993, the Court and the Parliament came into increasing political conflict with President Yeltsin. This conflict reflected, on the one hand, Yeltsin's impatience with the Soviet-era Constitution that put most power in the hands of a Parliament selected under the old regime in a less than fully democratic process, and, on the other hand, the Court's total lack of judicial self-restraint. Yeltsin won the conflict in the fall of 1993 when he suspended the Court and incorporated a court-packing plan into the Constitution that went into effect after he declared that the plan had been ratified in a referendum in the fall of 1993. Parliament adopted a new statute for the Court in 1994. However, due to President Yeltsin's difficulties in having some of his appointees confirmed, the reconstituted Court did not reach a quorum until early in 1995. This left a gap in constitutional review from October 1993 until early 1995. The revived Constitutional Court has exercised much more self-restraint and has created a highly creditable record of decision making. Now I would like to discuss how the Constitutional Court has applied the Constitution, and how particular

decisions affect individual rights, which I understand are a key focus of this lecture series.

2. *The First Constitutional Court*

The 1992-1993 Constitutional Court had one important power that is lacking in the 1994 statute of the current Court. This was the power to hold judicial practice in applying legislation to be unconstitutional. One of its earliest decisions, on February 4, 1992, held that both a labor code provision allowing arbitrary discharge and a 1984 USSR Supreme Court ruling interpreting this provision were violations of the constitutional right to employment.⁷ This was the first application of the Court's power to hold judicial practice unconstitutional. A January 27, 1993 decision held that the judicial practice of the Supreme Court of the Russian Federation in applying the Labor Code was unconstitutional.⁸ At this point, it appeared that the Constitutional Court was on its way to establishing its supremacy over the other court systems in constitutional matters.

The Court rendered a number of important decisions protecting citizens against arbitrary government action. In one of these decisions, the Court held that a government agency could not get out of its promise to sell cars to railroad workers at fixed prices, even though inflation had made the prices ridiculously low.⁹ This decision is a keystone of the Russian market economy, for it completely repudiates the Soviet practice of changing the rules of the economic game upon the whim of the ruling officials.¹⁰ A decision on Communist Party property, which held that Yeltsin's decree seizing Party property was unconstitutional as applied to property paid for out of local Party funds, was another important step in protecting property rights. These and a number of other decisions showed a willingness to apply the Constitution even when the result would cost the government substantial sums of money.

Several of the early decisions emphasized the right of access to court, a right guaranteed by Article 63 of the Constitution then in effect.¹¹ In a decision of February 5, 1993, the Court found the arbitrary, unappealable

7. Vestn. Konst. Suda RF, 1993, No. 1 [monthly], case re: Article 33 of the Code of Laws on Labor.

8. Vestn. Konst. Suda RF, 1993, Nos. 2-3 [monthly], case re: limiting payment in case of illegal discharge.

9. Vestn. Konst. Suda RF, 1993, Nos. 2-3 [monthly], case re: Decree of the Government of the Russian Federation of Jan. 24, 1992.

10. Bernard Rudden, *Civil Law, Civil Society, and the Russian Constitution*, 110 L.Q. REV. 56 (1994).

11. Equivalent to Article 46 of the current Constitution.

eviction of squatters to be unconstitutional.¹² And in a decision of April 16, 1993, it found the practice of denying fired prosecutors the right to appeal to court failed to meet constitutional requirements.¹³ All these decisions were tempered by the Court's cautious approach to the question of righting the many constitutional violations committed by the Soviet regime. An October 1993 case held that Article 63 applied prospectively only to give government officials the right to contest their firing in court.¹⁴

3. *The Constitutional Court Under the 1994 Statute*

Under the 1994 statute, the relation of the Constitutional Court to the other court systems has been quite different. The Court no longer has the right to review judicial practice. Commercial courts and courts of general jurisdiction at all levels have the right to refer constitutional questions to the Constitutional Court. However, there are only half-a-dozen reported cases in which this power was used. One of these cases involved a referral by the Civil Division of the Russian Supreme Court; all the other referrals were by lower courts. Given the lack of the power to review judicial practice and the underutilization of the referral power, one provision of the 1994 statute took potentially great importance. This provision, which repeated a similar provision of the 1991 statute, gave quasi-precedential effect to Constitutional Court decisions invalidating a statute or other legal act. Under this provision, all courts were ordered to treat as void not only the invalidated act, but also other acts that had like provisions to those found unconstitutional in the invalidated act.

The reconstituted Constitutional Court was quick to bemoan its inability to deal with judicial practice. In a June 15, 1995 decision, the Court reaffirmed its 1993 decision on the unconstitutionality of judicial practice that limited pay for lost wages, and regretted that it had neither some means of dealing with judicial practice that disobeyed the 1993 decision nor of forcing Parliament to solve the problem. Enforcement difficulties were also reflected in two cases on the residence registration system, which had replaced the residence permit system held invalid in 1992 by the Committee on Constitutional Supervision. As it turned out, the new residence registration system was treated by the administrative authorities in practice very much like the unconstitutional residence permit system. In the case of Sitalova, which I have written on elsewhere, the Constitutional Court invalidated most of the negative effects of the residence permit system.

12. Vestn. Konst. Suda RF, 1993, Nos. 4-5 [monthly], case re: Edict of Aug. 23, 1991.

13. Ross. Gazeta, 22 July, 1993.

14. Vestn. Konst. Suda RF, 1994, No. 6 [monthly], case re: legislation in effect before June 21, 1990.

However, undaunted, the Moscow city authorities returned with a new approach, that of charging gigantic fees for residence registration. In April 1996, the Court held these prohibitive fees to be unconstitutional. However, this is unlikely to be the last of the residence permit litigation.

There were many other cases in which the Court struck down legislation, including: laws barring all strikes in civil aviation;¹⁵ providing criminal penalties for "fleeing abroad";¹⁶ barring lawyers without a security clearance from cases involving national security;¹⁷ denying credit for pretrial detention while the defense was studying the record of the preliminary investigation;¹⁸ and allowing a judge to institute a criminal case.¹⁹

There also were a number of cases that denied claims of constitutional rights. For instance, the Court upheld legislation limiting criminal defense work to lawyers who were members of semi-official lawyers' organizations.²⁰ The dissent in this case is jurisprudentially interesting. It makes a convincing case on the basis of rejected drafts and debate during the Constitution-making process that the majority has completely misinterpreted the Constitution.

VII. THE CONSTITUTIONAL COURT AND THE OTHER COURT SYSTEMS

In addition to problems with enforcement, some members of the Constitutional Court fought a losing battle during this period with the supreme court's increasing assertion of authority to apply the Constitution directly. A case decided by the Constitutional Court in May of 1995 was somewhat contradictory.²¹ This case involved the question of whether a person under an order of pre-trial detention had a right to a court evaluation of the validity of the detention order.²² The Court found that the courts of general jurisdiction had acted erroneously in following the Criminal Procedure Code, which would deny the right to such an appeal, since the denial of the right to appeal violated the general right to a judicial remedy guaranteed by Article 46 of the Constitution. In dictum, it suggested that the courts of general jurisdiction should have referred the issue to the Constitutional Court and went on to note that these courts did not have the power to declare a law unconstitutional.

15. *Sobr. Zakonod. RF*, 1995, No. 21 [weekly], Case No. 5-P.

16. *Sobr. Zakonod. RF*, 1996, No. 1 [weekly], Case No. 17-P.

17. *Vestn. Konst. Suda RF*, 1996, No. 2 [monthly], case re: Law on State Secrecy.

18. *Ross. Gazeta*, 2 July, 1996.

19. *Ross. Gazeta*, 6 Dec., 1996.

20. *Ross. Gazeta*, 18 Feb., 1997.

21. *Sobr. Zakonod. RF*, 1995, No. 19 [weekly], Case No. 4-P.

22. *Id.*

It is clear that this dictum is in no way binding. The only binding action the Constitutional Court can take is to declare a particular legal act unconstitutional. Furthermore, it is unclear what this dictum meant. Did it mean that the courts of general jurisdiction, including the supreme court, do not have the power, which only the Constitutional Court has, to declare a law unconstitutional with an effect equal to repeal of the law? Or did it go further and mean that the courts of general jurisdiction were bound in every case either to apply the law before it or to refer the case to the Constitutional Court—that they could not merely refuse to apply an unconstitutional law? In either case, the courts of general jurisdiction have ignored this dictum entirely. Paradoxically, this case greatly extended the powers of the courts of general jurisdiction and the commercial courts. By adopting the principle that Article 46 of the Constitution guaranteed a legal remedy for every wrong, it indicated to the courts that given the rule that Constitutional Court decisions were to be applied to analogous situations, they were free to always find laws denying remedies unconstitutional.

A number of cases involving equal protection principles also opened the door for application of the same broad principles by the other court systems. These included cases holding unconstitutional: legislation giving less rights to a child than to adult victims of Communist repression;²³ discrimination in discharge against pension-age police;²⁴ and denial of pensions to convicted criminals.²⁵

Several cases stated broad principles of protection of entitlements and property rights, principles that likewise could serve as the basis for broad application in cases in the other court systems. These included cases holding unconstitutional: automatic loss of rights to low rent state housing in case of long-term imprisonment;²⁶ and restrictions on testamentary disposition by collective farm members.²⁷

Two other cases are of very specific relevance to the interrelation between the Constitutional Court and the other court systems. The first case involved a complaint that the libel provision of the Civil Code violated the right of free speech.²⁸ The Constitutional Court refused to decide the question in the abstract, but instead indicated that the courts of general jurisdiction would have to distinguish unprotected defamatory fact statements from protected negative political evaluations.²⁹ This case appears to

23. Case No. 6-P of May 23, 1995 (official electronic text from NTTs "Sistema"), available in KODEKS, Zakonodatel'stvo Rossii (polnyi nabor dokumentov) database.

24. Ross. Gazeta, 15 June, 1995.

25. Ross. Gazeta, 25 Oct., 1995.

26. Sobr. Zakonod. RF, 1995, No. 27 [weekly], Case No. 8-P.

27. Ross. Gazeta, 25 Jan., 1996.

28. Ross. Gazeta, 22 Nov., 1995.

29. *Id.*

recognize the legitimacy of the courts of general jurisdiction applying the Constitution directly. In a case involving a retroactive tax, the Constitutional Court interpreted its jurisdiction to include complaints not only of natural persons but also of legal persons.³⁰ While the Constitution does not explicitly protect the property rights of legal persons, the Court held that a violation of the property rights of a legal person was an indirect violation of the property rights of the citizens who owned the legal person—the shareholders or stockholders—and so violated these citizens' constitutionally protected property rights.³¹ This case brought the Court into potentially overlapping jurisdiction with the commercial courts where suits by legal persons against government agencies normally are decided.

VIII. THE SUPREME COURT STARTS TO APPLY THE CONSTITUTION

A. *The Beginnings*

I have already mentioned the limited references made to the Constitution by the USSR Supreme Court in the Soviet period. In the post-Soviet period, the Russian supreme courts gradually became more bold in using the Constitution. In a decision of December 8, 1992, the Russian Supreme Court directly applied Article 53 of the Constitution (which provides that everyone has the right to equal compensation for equal work) to uphold a lower court decision in favor of a worker denied a pay raise that was given to his fellow workers.³²

The Resolution of the Russian Supreme Soviet of December 12, 1991, "On Ratification of the Agreement on the Creation of the Commonwealth of Independent States," provided that USSR legislation would continue to be in effect in Russia to the extent that it did not violate the Russian Constitution, Russian legislation, or the agreement. The Russian Supreme Court interpreted this Resolution as requiring it to test each USSR law against the Russian Constitution before applying it. In a January 14, 1993 decision, for instance, the Judicial Division for Civil Cases of the Russian Supreme Court applied a 1991 USSR law after stating that it did not contradict the Russian Constitution.³³

On April 28, 1993, the Judicial Division for Criminal Cases of the Russian Supreme Court made a daring direct application of the Constitution.³⁴ A woman named Il'chenko was convicted under Article 190 of the Criminal Code for failure to report the commission of a murder by her

30. *Sobr. Zakonod. RF*, 1996, No. 45, Case No. 17-P.

31. *Id.*

32. *Biull. Verkh. Suda RF*, 1993, No. 4, p. 2.

33. *Biull. Verkh. Suda RF*, 1993, No. 5, p. 4.

34. *Biull. Verkh. Suda RF*, 1993, No. 8, p. 6.

husband, brother, and cousin. I would like to quote excerpts from a few paragraphs of the opinion in this case:

According to Article 67 of the Constitution of the Russian Federation, "No one is obligated to testify against himself, against his spouse, or against close relatives, the circle of which shall be defined by law." The law may also establish other cases of freedom from the obligation to give testimony.

As appears from the record of the case, the murder of Lushep with extraordinary cruelty was committed by Vdovyka, Plakhotnikov, and Mosienko in connection with the hostile relations that had arisen between Il'chenko and the victim. Thus, in reporting on the commission of the crime, Il'chenko would be compelled to a certain extent to testify against herself.

Vdovyka is Il'chenko's husband, and Plakhotnikov and Mosienko are her brother and cousin respectively.

A norm of criminal law may not contradict the rules provided in the Basic Law—the Constitution of the Russian Federation

Although responsibility for failure to report crimes is retained in the current Criminal Code, nevertheless, the provisions of Article 67 of the Constitution of the Russian Federation eliminate the punishability of the actions done by Il'chenko.³⁵

This is a key decision because it frees the defendant on constitutional grounds despite the fact that her conduct contained all the elements of a crime defined in the Criminal Code. Thus, in effect, it states that as applied in this case, the relevant Criminal Code article is unconstitutional. From this point on, the supreme court has acted as if it, and all the courts of general jurisdiction under it, has the power of judicial review.

The Criminal Division of the Supreme Court applied the Constitution directly again in a case it decided on September 1, 1993.³⁶ Two convicted defendants appealed alleging that they had inadvisedly waived the right to counsel at their trial. The court granted a new trial with appointed counsel, holding that "[f]ailure of the court to ensure the actual participation of lawyers in the trial of the case violated the constitutional right of the accused

35. *Id.*

36. *Biull. Verkh. Suda RF*, 1994, No. 6, p. 7.

to counsel."³⁷ A decision of March 2, 1994, in rejecting a complaint by a prosecutor that the court had improperly excluded testimony by the accused's wife, cited Article 50 of the Constitution.³⁸ An August 2, 1994 decision held that it was unconstitutional for someone to be tried by a person who had not been properly appointed as a judge.³⁹

Of course, the supreme court did not accept every claim of constitutional right. In a decision of March 29, 1993, the Judicial Division for Civil Cases rejected a claim that legal limitations on the right to strike violated Article 33 of the Constitution.⁴⁰ In a decision of August 1, 1994, the court took a like position, applying Article 37 of the 1993 Constitution.⁴¹

In these early cases, the supreme court made particularly broad use of the right to a judicial remedy found in Article 63 of the old Constitution and in Article 46 of the 1993 Constitution. In a case decided on March 2, 1994, the court held that a citizen claiming to be the real inventor of an invention could sue in court, despite the fact that the statute only allowed administrative remedies.⁴² It applied Article 63 of the former Constitution.⁴³ A further important extension of its jurisdiction was made by the supreme court in a decision of November 9, 1994 in a case involving a suit by the American Smirnoff Vodka trademark owner against the upstart Russian Smirnov Vodka company. The lower courts and the Judicial Division for Civil Cases found no jurisdiction because the relevant statute called only for administrative appeals in trademark cases.⁴⁴ However, the Presidium of the Supreme Court held that Article 63 of the former Constitution (the equivalent of Article 46 in the present Constitution) overrode the relevant statute and provided a right to go to court.⁴⁵ It also rejected the argument that constitutional rights applied only to natural persons, or even more narrowly, only to citizens.⁴⁶ It cited Part 2 of Article 10 of the former Constitution (analogous to Part 2 of Article 8 of the current Constitution) as providing equal protection for all forms of property. It indicated that this meant that property rights, in particular intellectual property rights, would be protected equally for legal and natural persons.⁴⁷

Two years later, the Constitutional Court upheld legislation allowing the Tax Inspectorate to seize funds from the bank accounts of legal persons

37. *Id.*

38. *Biull. Verkh. Suda RF*, 1994, No. 5, p. 8.

39. *Biull. Verkh. Suda RF*, 1995, No. 3, p. 15.

40. *Biull. Verkh. Suda RF*, 1993, No. 8, p. 3.

41. *Biull. Verkh. Suda RF*, 1994, No. 10, p. 2.

42. *Biull. Verkh. Suda RF*, 1995, No. 2, p. 3.

43. *Id.*

44. *Biull. Verkh. Suda RF*, 1995, No. 1, p. 11.

45. *Id.*

46. *Id.*

47. *Id.*

without a court order, even though such a seizure required a court order if made from the assets of private citizens.⁴⁸ The Constitutional Court specifically rejected arguments based upon equality of various forms of property ownership. This and the case just discussed raise a question that is as of yet unanswered: what will happen when two court systems reach different conclusions on the same constitutional question? In particular, there appears to be a real possibility for a problem if the supreme court finds a law unconstitutional, while the Constitutional Court finds the same law to be constitutional, since the statute on the Constitutional Court only gives binding force to findings of unconstitutionality.

B. *Recent Supreme Court Decisions*

Supreme court decisions in 1995 and 1996 on constitutional issues are analyzed in an excellent forthcoming article on recent supreme court practice in constitutional matters by Professor Peter Krug of the University of Oklahoma, which I highly recommend to you.⁴⁹ His emphasis is somewhat different from mine. He sees the supreme court as having suddenly moved into constitutional adjudication in 1995, while I see the movement as having been gradual over decades, with the most significant change in 1993.

The most important action taken in 1995 was the adoption of Resolution Number 8 of the Full Bench of the Supreme Court of the Russian Federation of October 31, 1995.⁵⁰ This resolution instructed judges to apply the Constitution directly whenever they came to the conclusion that legislation contradicted the Constitution.⁵¹ It suggested that if they were in doubt, they could apply to the Constitutional Court for a ruling.⁵² This ruling went on to indicate how the Constitution should be applied in a number of specific areas of the law: right to strike, right to change one's place of residence, exclusion of illegally obtained evidence, right to counsel, and right against self-incrimination.⁵³ This Resolution essentially summed up the constitutional law principles developed by the supreme court in deciding cases in 1993 and 1994. The Russian Supreme Court publishes a variety of general exhortations in its bulletin. Despite their informal nature, these exhortations undoubtedly are influential given the natural reluctance of judges to avoid reversal. In a survey of judicial practice published in 1995, the First Deputy Chairman of the Supreme Court indicated that lower courts

48. Ross. Gazeta, 26 Dec., 1996.

49. Peter Krug, *Departure from the Centralized Model: The Russian Supreme Court and Constitutional Control of Legislation*, __VA. J. INT'L L. __ (199_).

50. Ross. Gazeta, 28 Dec., 1995.

51. *Id.*

52. *Id.*

53. *Id.*

should follow the International Covenant on Civil and Political Rights—which is incorporated into Russian law by the Russian Constitution—rather than the more restrictive rules of the Criminal Procedure Code, in determining the circumstances giving the right to appeal detention to a court.⁵⁴

To give a flavor of the specific holdings, I will summarize briefly a few of the more important cases in the courts of general jurisdiction. A 1995 decision of the Judicial Division for Civil Cases held that a stockholder has the right under Article 46 of the Constitution to contest in court a decision of the general meeting of stockholders.⁵⁵ A case decided March 1, 1995 applied Article 57 to a claim of improper discharge by an official in Yaroslavl Oblast.⁵⁶ A military appeals court held that it was error for a trial court to order its own expert examination—that this violated Article 123 of the Russian Constitution, which provided for adversarial trial procedure. This radical ruling was reversed by the Military Division of the Supreme Court of the USSR.⁵⁷ A November 9, 1995 decision applied Article 35 of the Constitution to require compensation for taking of the home.⁵⁸ This was done even though the home was not actually taken, rather its use was severely restricted.⁵⁹ A 1995 decision of the Judicial Division for Civil Cases held that under Article 61 of the Constitution an accused could not be extradited to another country without a basis in law or international treaty.⁶⁰

In a decision of July 5, 1995 involving the firing by President Yeltsin of the head of administration of Lipetsk Oblast, the supreme court found that the plaintiff had the right to apply to court under the general guarantee of Article 63 of the prior Constitution and Article 46 of the current Constitution, and rejected the argument that the proper recourse was to the Constitutional Court; pointing out that since the plaintiff was a citizen and the act complained of was not a normative act, there would be no access to the Constitutional Court.⁶¹ A 1994 decision of the Judicial Division for Criminal Cases reversed a lower court decision denying a jury trial, where one defendant wanted a jury and the other did not, on the basis of Article 20

54. Biull. Verkh. Suda RF, 1995, No. 2, p. 12. This publication preceded the Constitutional Court decision on a similar issue in the case of Avetian. See Ross. Gazeta, 12 May, 1995.

55. Judicial Division for Civil Cases, Survey of Judicial Practice, Biull. Verkh. Suda RF, 1995, No. 10, pp. 9-10.

56. Biull. Verkh. Suda RF, 1995, No. 9, p. 1.

57. Case 4n-04/95 (in *Voennaia Kollegiia Verkhovnogo Suda Rossiiskoi Federatsii, Obzor kassatsionnoi nadzornoj praktiki za 1995*), Jan. 1, 1996, available in KODEKS, Zakonodatel'stvo Rossii (polnyi nabor dokumentov) database.

58. Biull. Verkh. Suda RF, 1996, No. 4, p. 4.

59. *Id.*

60. Biull. Verkh. Suda RF, 1995, No. 6, p. 5.

61. Biull. Verkh. Suda RF, 1996, No. 2, p. 1.

of the Constitution.⁶² A 1995 decision of the Judicial Division for Criminal Cases applied Article 20 of the Constitution on the right of an accused facing a death penalty to a jury trial, and Article 15 of the Constitution, on the direct application of the Constitution to hold that a defendant had a right to a jury trial regardless of the wishes of his codefendants.⁶³ A similar decision was made on October 25, 1994.⁶⁴ Decisions on right to jury trial and exclusion of evidence were summarized in a December 20, 1994 ruling of the Plenum of the Supreme Court.⁶⁵

A ruling of the Plenum of the Supreme Court of October 25, 1996 added to an earlier ruling a reference to Article 35 of the Constitution restricting property from being taken except by decision of a court. A February 7, 1996 decision held that the right to be tried by the court specified in procedural legislation was a constitutional right under Article 47 of the Constitution.⁶⁶ A decision of February 29, 1996 applied Articles 72 and 76 of the Constitution on the relation of federal and local legislation and found that a local law establishing a high fine for the distribution of "erotic productions" violated federal law.⁶⁷ A decision of January 3, 1996 held that an individual's refusal to register a citizen in an apartment in Moscow that she owned because she had refused to pay a huge registration fee levied on new residents violated Articles 27 and 55 of the Constitution.⁶⁸ This decision echoed decisions of the Constitutional Court on residence permits but did not cite them.⁶⁹

A decision of June 26, 1995 applied Article 46 of the Constitution to provide a fired senior assistant procurator the right to contest his discharge in court even though the relevant legislation provided only for non-judicial contestation.⁷⁰ Article 46 was also applied in a decision of November 17, 1995 on the right to challenge a decision of an election commission.⁷¹ A decision of October 23, 1995 applied Article 46 to a libel suit by a police official against a procurator.⁷² A 1995 decision applied Article 46 to a complaint about electoral rights.⁷³ A decision of August 11, 1995 applied Article 46 to hold that a citizen had the right to sue the St. Petersburg city authorities for failure to provide cut-rate transportation guaranteed to

62. Biull. Verkh. Suda RF, 1995, No. 1, p. 14.

63. Biull. Verkh. Suda RF, 1995, No. 7, p. 14.

64. Biull. Verkh. Suda RF, 1995, No. 2, p. 8.

65. Biull. Verkh. Suda RF, 1995, No. 3, p. 2.

66. Biull. Verkh. Suda RF, 1996, No. 12, p. 2.

67. Biull. Verkh. Suda RF, 1996, No. 5, p. 1.

68. Biull. Verkh. Suda RF, 1996, No. 3, p. 4.

69. *Id.* See generally *supra* Part VI.3.

70. Biull. Verkh. Suda RF, 1996, No. 3, p. 6.

71. Biull. Verkh. Suda RF, 1996, No. 3, p. 5.

72. Biull. Verkh. Suda RF, 1996, No. 3, p. 7.

73. Biull. Verkh. Suda RF, 1996, No. 4, p. 1.

veterans by federal statute.⁷⁴ A decision of March 25, 1996 held that Article 46 allowed suit for failure to hire even in cases where the Labor Code did not.⁷⁵ In a decision of February 5, 1996, the Judicial Division for Civil Cases applied Article 123 of the Constitution on the adversary nature of proceedings to put the burden of proof on the customs service in a case contesting a sanction leveled against a joint venture.⁷⁶

IX. THE COMMERCIAL COURTS AND THE CONSTITUTIONS

A. *Early References to the Constitution*

Like the courts of general jurisdiction, the commercial courts referred to the Constitution from time to time even in the Soviet period. A 1990 Survey of Practice refers to a case in which a Lipetsk Region court upheld certain actions of the Lipetsk Region Executive Committee as being within its constitutional powers.⁷⁷ The survey, in a letter signed by Deputy Chief Judge V.V. Vitriansky, criticized this decision, indicating that the court should have applied a USSR statute that invalidated the Executive Committee's action.⁷⁸ This criticism perhaps reflected the spirit of the times when a USSR statute normally trumped a constitutional provision.

B. *General Instructions to the Lower Commercial Courts*

A 1993 letter and a 1994 instruction letter from the High Commercial Court provide guidance to the lower commercial courts on the application of the Constitution.⁷⁹ The first letter was rather cautious. It stated that suits seeking the recognition of acts of the Council of Ministers of the Russian Federation, or of the Council of Ministers of republics in the system of the Russian Federation, as unconstitutional are not subject to the jurisdiction of the commercial court since decision of this question is in the competence of the Constitutional Court of the Russian Federation.⁸⁰

This letter, signed by Veniamin Yakovlev, the chief judge of the Constitutional Court, represented an attitude in sharp contrast to the practice

74. Biull. Verkh. Suda RF, 1996, No. 5, p. 2.

75. Biull. Verkh. Suda RF, 1996, No. 6, p. 2.

76. Biull. Verkh. Suda RF, 1996, No. 5, p. 4.

77. Letter of Dec. 24, 1990, No. S-13/OPI-455, available in KODEKS, Zakonodatel'stvo Rossii (polnyi nabor dokumentov) database.

78. *Id.*

79. Instruction Letter of Aug. 25, 1994, No. S3-7/OZ-614, available in KODEKS, Zakonodatel'stvo Rossii (polnyi nabor dokumentov) database; Letter of Mar. 20, 1993, No. S-13/OP-98, available in KODEKS, Zakonodatel'stvo Rossii (polnyi nabor dokumentov) database.

80. *Id.*

the Russian courts of general jurisdiction were adopting in 1993. However, the 1994 instruction letter signed by Deputy Chief Judge V.V. Vitriansky largely paraphrased the 1994 statute on the Constitutional Court. In particular, it quoted the provision of Part 2 of Article 87 of the statute, which indicated that invalidation of particular provisions of a normative act also invalidated other normative acts based on the invalidated provisions and like provisions in other normative acts. As I have already suggested, this article opens broad possibilities for the exercise of constitutional jurisdiction by the commercial courts.

C. *Specific Reference*

In a few instances, Russian statutes make specific references to the Constitution. Article 11 of the 1991 Land Code provided that alienation of land parcels should be in accordance with Article 12 of the Russian Constitution. The commercial court of St. Petersburg applied Article 12 of the Constitution to hold a land sale invalid. This decision was cited with approval in a letter of the High Commercial Court dated July 31, 1992.⁸¹

Article 41 of the Commercial Court Procedure Code gives the procurator of a subject of the Russian Federation the right to bring cases before a commercial court. The Udmurt Republic Commercial Court denied this right to the Procurator of the Yamalo-Nenets Autonomous District, reading it as allowing the procurator of a subject of the Russian Federation only to bring a suit in the commercial court of the same subject of the Russian Federation. In interpreting the statute, the Presidium of the High Commercial Court applied the definition of subject of the Russian Federation found in Article 65 of the Russian Constitution.⁸²

D. *Statute Implementing the Constitution*

Russian statutes often paraphrase or directly implement constitutional provisions. In such cases, commercial courts may cite the statutory and constitutional provision in parallel, a practice similar to the practice of the Communist-era Supreme Court.⁸³ An example is a 1996 case decided by the North-Western District Commercial Court, involving a question of the jurisdictional line between the commercial courts and the courts of general

81. "O razreshenii sporov, svyazannykh s primeneniem zakonodatel'stva o sobstvennosti," (*i.e.* On the Decision of Disputes Connected With the Application of Legislation on Ownership) Letter No. C-13/OP-171, *available in* KODEKS, Zakonodatel'stvo Rossii (polnyi nabor dokumentov) database.

82. Case No. 8661/95 (38-425-96) (ruling of June 25, 1996), *available in* KODEKS, Zakonodatel'stvo Rossii (polnyi nabor dokumentov) database.

83. *See generally supra* Part IV.

jurisdiction.⁸⁴ It cited both the statutory and constitutional jurisdiction provisions as the basis for its decision.⁸⁵

E. *Narrow Application of Precedent*

The commercial courts routinely apply the narrow, specific holdings of the Constitutional Court on constitutional issues. The full bench of the High Commercial Court remanded a case involving ownership of a building that was constructed for the Communist Party with state funds so it could be decided in accordance with the decision of the Constitutional Court that held President Yeltsin's decree on seizure of Party property partly constitutional and partly unconstitutional.⁸⁶ A 1995 decision of the High Commercial Court involved a presidential decree that had been partially invalidated by the Constitutional Court. The commercial court held that since the Constitutional Court ruling was not expressly retroactive, transactions made in reliance on the decree before the Constitutional Court ruling were unaffected by the ruling.⁸⁷

F. *Broad Application of Precedent*

A 1995 instruction letter from Chief Judge Veniamin Yakovlev of the High Commercial Court called for a much broader application of precedent.⁸⁸ The letter cited the Constitutional Court case of Avetian,⁸⁹ discussed above—the case that provided access to court for a person under an order of detention. The letter quoted the broad holding of Avetian: “the right to judicial protection may not be limited in any circumstances.”⁹⁰ It instructed the commercial courts to be guided by this holding in their decisions.⁹¹ This letter is of considerable significance. As the number of Constitutional Court decisions grows, the number of broad holdings that must be followed will increase. It is possible that, by applying this expanding group of broad holdings, the commercial courts will move in their

84. Case No. 273/95 (ruling of Mar. 19, 1996), *available in* KODEKS, Zakonodatel'stvo Rossii (polnyi nabor dokumentov) database.

85. *Id.*

86. Case No. K1/31 (ruling of July 1, 1993), *available in* KODEKS, Zakonodatel'stvo Rossii (polnyi nabor dokumentov) database.

87. Case No. 6299/95 (ruling of Dec. 26, 1995), *available in* KODEKS, Zakonodatel'stvo Rossii (polnyi nabor dokumentov) database.

88. Instruction Letter of June 14, 1995, No. S1-7/OP-328, *available in* KODEKS, Zakonodatel'stvo Rossii (polnyi nabor dokumentov) database.

89. *Ross. Gazeta*, 12 May, 1995.

90. Instruction Letter of June 14, 1995, No. S1-7/OP-328, *available in* KODEKS, Zakonodatel'stvo Rossii (polnyi nabor dokumentov) database.

91. *Id.*

application of constitutional law to a position similar to that of the courts of general jurisdiction.

G. *Direct Application of Constitutional Provisions*

In a case involving a municipal enterprise formed with charter provisions in violation of federal law, the North-Western District Federal Arbitration Court invoked Article 15 of the Constitution to hold that the provisions of federal law prevailed over the charter provisions.⁹²

By 1996, the High Arbitration Court had begun to apply the Constitution directly. One case involved a suit by the Deputy Procurator of the Republic of Tatarstan against the Tatarstan Division of the Russian Federation Pension Fund, which had exacted a penalty of one-half billion rubles against a military electronics factory located in Tatarstan. The lower commercial courts ruled for the procurator and the factory on the ground that the factory was exempt from penalties due to a joint document signed by the Chairman of the Government of the Russian Federation, the Minister of Finance of Russia, and the Minister of Defense of Russia, and also a resolution and a decree of the Cabinet of Ministers of Tatarstan. The Presidium of the High Commercial Court held that the Tatarstan legislation was in violation of Article 71 of the Russian Constitution, which placed federal taxes in the jurisdiction of the Russian Federation.⁹³ It rejected the document signed by the high Russian officials as not being a normative act, noting that it had not been officially registered.⁹⁴

In a letter of December 5, 1996, the Presidium of the High Arbitration Court instructed lower courts to apply international treaties directly in accordance with Article 15 of the Constitution, and to interpret rules on paying court costs so as to effectively provide foreign plaintiffs with access to court in accordance with Article 46 of the Constitution.⁹⁵ Also in 1996, the St. Petersburg commercial court invalidated a Decree of the Head of Administration of the Podporzhsky District instituting a new tax as an attempt to exercise tax powers allocated by the Constitution to the federal legislative authorities.⁹⁶ And the North-Western District Commercial Court,

92. Case No. 241/96 (ruling of Mar. 14, 1996), *available in* KODEKS, *Zakonodatel'stvo Rossii* (polnyi nabor dokumentov) database.

93. Case No. 148/96 (ruling of Sept. 17, 1996) *available in* KODEKS, *Zakonodatel'stvo Rossii* (polnyi nabor dokumentov) database.

94. *Id.*

95. Letter of Dec. 25, 1996, No. 10, *available in* KODEKS, *Zakonodatel'stvo Rossii* (polnyi nabor dokumentov) database.

96. Letter of the State Tax Inspectorate of the Russian Federation for Leningrad Region, July 1, 1996, No. 15-09/2391, *available in* KODEKS, *Zakonodatel'stvo Rossii* (polnyi nabor dokumentov) database.

citing Articles 71, 72, and 76 of the Russian Constitution, upheld a lower court decision finding invalid rules adopted by the State Property Committee and the Russian Federal Property Fund—rules that had been agreed upon with the Ministry of Finance, the State Tax Service, and the Central Bank.⁹⁷

Overall, the number of constitutional cases in the commercial courts is much less than in the courts of general jurisdiction. There are three reasons for the difference: the overall caseload is much less than that of the regular courts; there are no criminal procedure issues; and the approach of the High Commercial Court has been rather conservative.

X. CONCLUSION: CONSTITUTIONAL CONSCIOUSNESS IS SPREADING

Overall, I found my survey of how Russian courts are treating the Constitution to be very encouraging. There is some unfinished business in the coordination of the three independent judicial systems. However, the Constitution appears to have become a fundamental part of legal thinking of the judges of all three court systems. This is all the more remarkable considering that top levels of the court systems are dominated by lawyers educated during the Communist period. I think one cannot underestimate the importance of comparative lawyers, and particularly of John Hazard, who actively promoted exchanges, conferences, and interaction between Soviet and foreign lawyers, who kept open the channels through which these lawyers were exposed to modern ideals of human rights and constitutionalism.

97. Case No. 108/96 (ruling of Feb. 8, 1996), *available in* KODEKS, *Zakonodatel'stvo Rossii (polnyi nabor dokumentov)* database.

